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IN THE

Supreme Court of the United States

October Term, 1967

No. 587

HENRY CARTER LITTON, PETITIONER

V.

COMMONWEALTH OF VIRGINIA, RESPONDENT

PETITION FOR CERTIORARI

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COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF SAID COURT:

PRELIMINARY

Petitioner seeks a review of a final judgment of the Supreme Court of Appeals of Virginia entered June 14, 1967, which refused to grant his petition for a writ of error and supersedeas to an order of the Circuit Court of Washington County, Virginia, entered December 19, 1966. The effect of the judgment of the Supreme Court of Appeals of Virginia complained of was to affirm the conviction of the petitioner in the Circuit Court of Washington County, Virginia for driving under the influence of intoxicants.

The Circut Court of Washngton County and the Supreme Court of Appeals of Virginia upheld the validity of Virginia's Implied Consent Law as to blood tests in prosecutions for driving under the influence of intoxicants (Va. Code of 1950, § 18.1-55.1) over constitutional objections

that it violated the rights of defendant in that it denied him the right to be confronted with the witnesses against him; compelled him to be a witness against himself; and did not require the Commonwealth to have a search warrant prior to taking the blood.

This Implied Consent Law in essence provides that any person who operates a motor vehicle on a public highway in Virginia shall be deemed to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof if such person is arrested for operating a vehicle under the influence of intoxicants, and further provides for the admission into evidence of the result of the test.

R. refers to the court file, and Tr. refers to the transcript of testimony and incidents of trial. Emphasis is added unless otherwise indicated.

I.

OPINIONS AND REPORTS BELOW

There is no official or unofficial report and there was no opinion in either court below. A copy of the judgment of the Supreme Court of Appeals of Virginia of June 14, 1967 is appended as Appendix I. Virginia Reports when printed in the hardbound volume will refer to this case in the front of the volume.

II.

GROUNDS OF JURISDICTION

A. The date of the judgment of the Supreme Court of Appeals of Virginia sought to be reviewed is June 14, 1967. (R. 29).

B. There has been no order respecting a rehearing, and no order granting an extension of time within which to petition for certiorari.

C. This court is believed to have jurisdiction of this matter under Title 28, Sections 1257 (b) and (c) U.S. Code.

III.

QUESTIONS PRESENTED FOR REVIEW

Virginia Code Section 18.1-55.1 requires a person charged with driving under the influence of intoxicants to submit a sample of his blood for testing. If he refuses to submit a sample of his blood, he is tried for so refusing and punished if the refusal is found unreasonable by having his driver's license suspended for a period of 90 days for a first offense. The blood sample given is divided into two parts. One part is sent to the State Laboratory in Richmond for analysis, and the other part, if the defendant requests it, is sent to a private laboratory for analysis. Written reports of the analysis of blood are then returned to the court and are admissible as evidence in the trial of the defendant on the charge of driving under the influence of intoxicants. See R. p. 23B for the written report of the State Laboratory, R. p. 23C for the written report of the private laboratory, and Appendix 3 for the applicable code provisions.

The defendant in this case gave his blood and requested a private analysis of the blood in addition to that made by the State.

We contend that the Virginia Statute requiring blood to be so given and allowing the results of the tests to be so admitted into evidence, is in violation of three amendments to the Constitution of the United States, and that the questions presented for review are as follows:

A. Does Virginia Code Section 18.1-55.1 violate the Sixth-Amendment to the United States Constituion in that it denies the right of the defendant to be confronted with the witnesses against him by admitting into evidence written results of blood tests without having the person who performed the tests in court as a witness?

B. Does Virginia Code Section 18.1-55.1 violate the Fifth Amendment to the United States Constitution in that it compels the defendant in a criminal case to be a witness against himself by agreeing either to give his blood to be used as evidence against himself, or in the alternative being

subjected to trial and punishment for unreasonably refusing to give a blood sample?

C. Does Virginia Code Section 18.1-55.1 violate the Fourth Amendment to the United States Constitution in that it requires the taking of a blood sample from persons charged with driving under the influence of intoxicants without the issuance of a search warrant, although there may be no emergency situation?

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions involved are Amendments IV, V, and VI to the United States Constitution. See Appendix 2.

The Statutes involved are Virginia Code Section 18.1-55.1, Virginia Code of 1950 (as amended 1966), Acts of Assembly 1966, p. 977; and Virginia Code Section 18.1-57, Virginia Code of 1950 (as amended 1966), Acts of Assembly, 1966, p. 982. See Appendix 3.

V.

STATEMENT OF THE CASE

A.

Henry Carter Litton is a hard of hearing cabinet maker from Washington County, Virginia. On August 31, 1966 he was returning to his home in his pickup truck from Bristol, a nearby town, with a load of lumber which hung over the back of the truck, when he was arrested by a State Trooper and charged with driving under the influence of intoxicants. By his own admission he had had two cans of beer. The State Trooper who arrested him stated he could smell a strong odor of alcoholic beverage on Litton, that Litton's car was wavering, and that Litton was unsteady on his feet. Litton denied the effects, if any, of the beer. (Tr. 3, 4, 5, 36, 37, 39).

The State Trooper advised Litton that "he was required to take a blood test, which he immediately replied that he wanted a blood test and I brought him to the Johnston

Memorial Hospital in Abingdon, after securing a warrant for him for driving drunk. I brought him to the hospital in Abingdon and there the blood was drawn." (Tr. 5).

Litton did consent to the blood test (Tr. 40), and signed the form furnished by the State asking for an independent analysis. (R. 23A).

The arrest occurred about 3;07 p.m. and the blood was taken at 3:40 p.m. (Tr. 6). In the meantime the Trooper had an arrest warrant issued by a justice of the peace. (R. 2).

The State's sample of the blood was sent to the State Laboratory in Richmond, and the other sample, at Litton's direction, was sent to Dr. Gale in Roanoke. (R. 23A, 23B, 23C).

The blood samples were tested and the reports returned to the court. Both written reports, one from the State Laboratory, the other from the private laboratory, were admitted into evidence over objection of the defendant. The people who performed the tests were not present as witnesses. (Tr. 7-10, 22-24, 26, 27, 47).

The court instructed the jury as to the legal effect of the blood test evidence (Tr. 48, 49, R. 5), and gave other instructions not material here. Virginia Code Section 18.1-57 sets forth the presumptions resulting from a given quantity of alcohol in the blood. See Appendix 3.

The trial resulted in Litton's conviction by a jury, which at first had hung. Litton was fined $200.00 and the court suspended his driver's license for a period of 12 months. (Tr. 55, 56, R. 19).

B.

Petitioner, during and after the trial, and in his assignments of error, raised the federal questions now sought to be reviewed in the following manner.

When the Commonwealth first sought to introduce the report of the blood tests the following objection was made:

"*The Court:* What is your second objection?

Mr. Widener: The ground that the whole thing is unconstitutional, and it is a serious objection, on the ground, first, that he is not permitted to cross-examine the people who made the blood test—

The Court: (Interrupting) The statute says that it shall be admissible in any court, in any criminal case, Mr. Widener.

Mr. Widener: (continuing)—confronted by his accusers. The second, that he is compelled to give evidence against himself, by the statute, and third, that the Commonwealth does not have any search warrant". (Tr. 8, 9).

The Commonwealth did not choose to introduce the results of the blood tests following the first series of objections which were overruled by the court, apparently because the witness who took the blood had not then testified. (Tr. 10).

When the Commonwealth again sought to introduce the results of the blood test, the following objections were made:

"Q. I will show you here, sir, a cerificate of blood alcohol analysis from the Chief Medical Examiner—

Mr. Johnson: (Interrupting) If His Honor please we renew our objection.

The Court: Overruled.

Mr. Johnson: Exception.

A. This is point eighteen per cent by weight — point one eight.

Mr. Brown: I will ask the Court to exhibit that as Commonwealth Exhibit Number Two — introduce it as Commonwealth Exhibit Number Two.

Mr. Johnson: Your Honor, we object to the introduction, for reasons previously stated.

The Court: Let it be marked Exhibit Number Two for the Commonwealth, Mr. Clerk.

Mr. Johnson: Exception.

By Mr. Brown:

Q. Did you receive a report from Roanoke Memorial Hospital, from Doctor James C. Gale, of the analysis of the blood sent there at Mr. Litton's direction?

A. Yes, sir, I did.

Mr. Johnson: The same objection to this, Your Honor.

The Court: Overruled.

Mr. Johnson: Exception.

Mr. Brown: I would like to introduce this by this witness, as Commonwealth Exhibit Three.

Mr. Widener: If it please the Court, we would like to object to this for the grounds previously stated and on the additional ground that Mr. Lauderdale testified . . . .

The Court: Overruled. Let it be received and marked Exhibit Number Three.

Mr. Widener: Exception.

Mr. Johnson: Exception." (Tr. 22, 23, 24).

The results of the blood test having been received in evidence, at the conclusion of the Commonwealth's evidence, defendant moved to strike the evidence of the Commonwealth. A part of this motion follows:

Mr. Widener: We would like to make a motion to strike the evidence of the Commonwealth, sir, . . . on the ground that the blood was unconstitutionally taken; because there was no search warrant; because Mr. Litton was deprived of the right to face his accusers and compelling him to give evidence against himself." (Tr. 60).

Litton filed a written motion to set aside the verdict of the jury which included in it the following grounds.

"III.

Evidence offered by the Commonwealth was admitted which ought to have been excluded, and evidence offered

by the defendant was excluded which ought to have been admitted.

"IV.

The court erred in failing to grant the motion of defendant to strike all the evidence of the Commonwealth at the conclusion of the Commonwealth's evidence, and again at the conclusion of all of the evidence." (R. 17).

Again, in his assignments of error Litton brought up the matter of the illegal evidence:

"III.

The court erred in admitting the results of either blood test into evidence because the taking of the blood from the body of the accused and its subsequent testing was under compulsion of law and a violation of the Constitutions of Virginia (Article 1, Section 8) and the U.S. (Amendments IV, V, VI, and XIV).

"IV.

The court erred in excluding evidence offered by the defendant which ought to have been admitted, and admitting evidence offered by the Commonwealth which ought to have been excluded." (R. 21).

ARGUMENT

INTRODUCTION

While the writer is far from as keen a student of government as may be, nevertheless a comment or two concerning the sense of the petition should serve to frame the later technical argument.

It is doubtful if a government ever was which did not, at some time in its existence, say that certain conditions in the land demanded correction so badly that departure waas needed from the ordinary rules of fair play in order to insure the criminal conviction of those whose behavior did not meet the standards accepted by the community.

This principle was recognized by Jefferson in his *Notes on Virginia* when he said "The time to guard against corruption and tyranny is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered."

This same thought was expressed by the first ten amendments to our Federal Constitution. They sought to guard against tyranny by establishing procedural rules of fair play which *could not* be transgressed by the government. For it is the state, in the last analysis, which only can be the ultimate tyrant, petty tyrants depending upon state enforcement for their preservation.

In reply to the remark by the Fourth Circuit in *Kay v. United States,* 255 F.(2d) 476, 479 (1958) describing the presumptions of the Virgina statute as not "merely procedural", we say that the preservation of procedural guarantees which protect the people from the governments, are of far more ultimate importance to this nation than the conviction of any given criminal.

No one can read of the trial of Sir Walter Raleigh without a feeling of revulsion at the methods used to convict, yet, stripped to their essentials, the same methods were here used by Virginia to convict Henry Carter Litton. The State in each case used as evidence of guilt a statement from a witness not present at the trial, not subject to cross-examination, and not in the courtroom where the jury could see him as he testified.

Both Raleigh and Litton were caught in the hue and the cry. To be sure their crimes were different, but the principle remains the same. In each case society in trying to protect itself from an actual or imagined wrong committed the infinitely greater sin of tearing down some of its basic fiber.

The development of the Implied Consent Law in Virginia is extensively discussed in the Virginia Comments section of the Washington and Lee Law Review, 38 W. & L. L. Rev. 370 (1961), and the Virginia Section of the University of Virginia Law Review, 49 Va. L. Rev. 386 (1963).

Both comments were written before the current amendments to the statute, nevertheless they are excellent compilations of authority on the subject.

This case involves indirectly the statutes of many states. This court has not decided the validity of an Implied Consent Law. It is our contention that the decision of the Virginia court is probably not in accord with applicable decisions of this court.

A.

DOES VIRGINIA CODE SECTION 18.1-55.1 VIOLATE THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT DENIES THE RIGHT OF THE DEFENDANT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM BY ADMITTING INTO EVIDENCE WRITTEN RESULTS OF BLOOD TESTS WITHOUT HAVING THE PERSON WHO PERFORMED THE TESTS IN COURT AS A WITNESS?

On November 17, 1603 Sir Walter Raleigh was brought to trial for treason against the crown. Sir Edward Coke conducted Raleigh's prosecution. His crime involved a conspiracy in a Spanish plot. At his trial Raleigh's chief accuser, an alleged conspirator, Lord Cobham, was imprisoned in the Tower of London and his statement given before a commission was produced by the able Coke.

Raleigh stated "But, My Lords, I claim to have my accuser brought here face to face to speak." He went on saying, "Mr. Attorney, if you proceed to condemn me by bare inference, without an oath, without a subscription, without witnesses, upon a paper accusation, you try me by the Spanish inquisition. If my accuser were dead or abroad it were something. But he liveth and is in this very house!" Raleigh continued, "Prove me guilty of these things by one witness only, and I will confess the indictment. If I have done these things I deserve not to live, whether they be treasons by law or no. Why then, I beseech you, my Lords, let Cobham be sent for! Let him be charged upon

his allegiance to the King. And if he then maintain his accusation to my face, I will confess myself guilty." *The Lion and The Throne,* Little Brown and Company, 1957, Catherine Drinker Bowen, pp. 201-203.

We must remember that trial by affidavit had been commonplace before the foundation of this country. It was to stop this practice that the right to confront one's accusers was incorporated into our Bill of Rights.

The fact that it is a modern state which seeks to introduce hearsay into a criminal trial does not make the hearsay any more palatable than it was in ancient times. The hearsay is still subject to the insurmountable objections that the accused has a right to have witnesses against him give their testimony in open court before a jury, and be subject to cross-examination by the accused in the presence of the jury. Nothing less will suffice.

Admittedly the certificates of the Chief Medical Examiner and of Dr. Gale are hearsay. There can be no question about that.

The Sixth Amendment expressly forbids the introduction of hearsay in a criminal case. This also is not arguable.

The question to be decided is, are the certificates in this case admissible into evidence under a recognized exception to the hearsay rule? We maintain they are not.

A long line of cases in this court have examined the question of recognized exceptions to the hearsay rule as circumventing the Sixth Amendment. A very recent case most nearly to the point is *Pointer v. State of Texas,* 380 U.S. 400, 85 S. Ct. 1965, 13 L. Ed. (2d) 923 (1965).

In the *Pointer case* the defendant was convicted and at the trial the court admitted transcribed evidence taken at a preliminary hearing at which the defendant did not have an attorney and did not in person cross-examine the witnesses. A witness who testified at the preliminary hearing had moved out of the state prior to the trial. This court reversed because the trial court had admitted the hearsay evidence giving as its principal reason the fact that defendant

had been denied the right to cross-examine and to confront the witness against him.

The court's reaasoning is expressed in the following excerpts from the opinion:

"It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.

"There are few subjects perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of *confrontation and cross-examination* is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." 85 S.Ct. 1065, 1068.

We have emphasized in the above quotation from the opinion the words *confrontation and cross-examination* particularly because we believe in the *Pointer case* this court has properly expressed the principle underlying the guarantee of the Sixth Amendment. Not only is the right to cross-examine the witness guaranteed, also guaranteed is the right to confront the witness in open court. To the practicing trial lawyer, not to mention the defendant, the right to have the jury look at the witness while he gives his testimony is equally as important as the right to cross-examine him. There is no way to cross-examine a certificate which is admitted into evidence by virtue of a statute. It is equally as impossible to convey to a jury whether or not a witness is lying by reading his certificate into evidence. The reading of a written certificate into evidence can never express to a jury the hesitation of a witness who is unsure of himself, or the clenched knuckles, tapping fingers, sweating, and nervousness of a witness who is caught lying. All

the scientific standards in the world cannot replace cross-examination *and* confrontation.

This thought was expressed by this court in the case of *Turner v. State of Louisiana,* 379 U.S. 468, 85 S.Ct. 546, 13 L. Ed. (2d) 424 (1965) when the court said:

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 85 S.Ct. 546, 550.

Down through the years this court has preserved inviolate the rights of defendants in criminal cases to cross-examine and confront their accusers. The case of *Kirby v. United States,* 174 U.S. 47, 19 S.Ct. 574, 43 L. Ed. 890 (1899) expressed the thought in this way:

"But a fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, who he is entitled to cross-examine, and whose testimony he may impeach in *every mode* authorized by the established rule governing the trial or conduct of criminal cases." 43 L. Ed. 890, 894.

The principle that exceptions to the hearsay rule can not be broadened or disturbed in criminal cases without violating the Sixth Amendment is expressed in *Salinger v. United States,* 272 U.S. 542, 47 S.Ct. 173, 71 L. Ed. 398 (1926).

"The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this court often has said, is to continue and preserve that right, *and not to broaden it or disturb the exceptions. Mattox v. United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409; *Robertson v. Baldwin,* 165 U.S. 275, 281-282, 17 S.Ct. 326, 41 L.Ed. 715; *Kirby v. United States,* 174 U.S. 47, 61, 19 S.Ct. 574, 43 L.Ed. 890; *Dowdell v. United States,* 221 U.S. 325, 330, 31 S.Ct. 590, 55 L.Ed. 753. The

present contention attributes to the right a much broader scope than it had at common law, and could not be sustained without departing from the construction put on the constitutional provision in the cases just cited." 47 S.Ct. 173, 175.

The validity of the Virginia Statute has been sustained by the Court of Appeals for the Fourth Circuit in the case of *Kay v. United States,* 255 F. 2d) 476 (1958). The same objection was made in the *Kay Case* as is here made, and the court's opinion is based on the following reasoning:

"Admission of the certificate did not deprive the defendant of his right of confrontation by witnesses. Neither the Sixth Amendment to the Constitution of the United States nor Article I, Section 8 of the Constitution of Virginia can be said to have incorporated the rule against hearsay evidence, as understood at the time of their adoption. Each was intended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule.

* * * *

"The power of the Congress and of a state legislature to provide for the admission of evidence is not subject to any such arbitrary limitation as the defendant supposes. They may carve out a new exception to the hearsay rule, without violating constitutional rights, where there is reasonable necessity for it and where it is supported by an adequate basis for assurance that the evidence has those qualities of reliability and trustworthiness attributed to other evidence admissible under long established exceptions to the hearsay rule. See *Tot v. United States,* 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519; *United States v. Leathers,* 2 Cir., 135F. 2d 507; *Matthews v. U.S.,* 5 Cir., 217 F.2d 409." 255 F. (2d) 476, 480-481.

We maintain that the reasoning of the Fourth Circuit is not sound, and the cases which it cites as supporting the opinion in fact hold to the contrary.

Tot v. United States was a case involving the validity of a statutory presumption created by Congress and did not

involve hearsay evidence. Not only did the opinion hold the presumption invalid, a concurring opinion reasoned that the statute was invalid in any event as a violation of the confrontation clause of the Sixth Amendment.

The case of *United States v. Leathers* was a case involving the admissibility of entries from the books of a bank. The Second Circuit held that these entries were admissible as business records kept as a matter of ordinary routine, a long recognized exception to the hearsay rule.

The case of *Matthews v. United States* specifically refused to admit into evidence sugar reports made by sellers of sugar to the Internal Revenue Service on the ground that admitting them contravened the Sixth Amendment, and stated the proposition that a statute cannot arbitrarily create a new exception to the hearsay rule which will overcome Sixth Amendment objections by virtue of having been enacted. The court said:

"To hold otherwise would be to hold that Congress could abolish the right of confrontation by making unlimited exceptions to the hearsay rule." 217 F. (2d) 409, 418.

This thought of the Second Circuit was expressed in another way in the civil case of *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). The *Palmer case* excluded from evidence the statement of a railroad engineer although the statement was made in the regular course of the business of the railroad, it being the regular course of the railroad business to take a statement of an engineer after an accident. This court said:

"In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. *Their primary utility is in litigating, not in railroading.*" 63 S.Ct. 477, 481.

The Virginia Statute in question in this case creates a report much like the report in the *Palmer case*. Its primary utility is in criminal litigation.

There are dozens of cases on the confrontation clause of the Sixth Amendment. We seriously maintain that not one of them from this court is in conflict with our proposition that the certificates from the State and from the private laboratory are equally inadmissible because neither gave the defendant the right to cross-examine the person who made the certificate nor the right to have such person give his evidence in open court in front of the jury. We contend that to hold otherwise will amount to a holding that a state legislature can completely ignore the Sixth Amendment by the simple expedient of grafting a series of exceptions onto the hearsay rule.

B.

DOES VIRGINIA CODE SECTION 18.1-55.1 VIOLATE THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT COMPELS THE DEFENDANT IN A CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF BY AGREEING EITHER TO GIVE HIS BLOOD TO BE USED AS EVIDENCE AGAINST HIMSELF, OR IN THE ALTERNATIVE BEING SUBJECTED TO TRIAL AND PUNISHMENT FOR UNREASONABLY REFUSING TO GIVE A BLOOD SAMPLE?

Virginia Code 18.1-55.1 (b) provides that any person operating a motor vehicle on the public highways has given his implied consent to submit a sample of his blood for testing to determine the alcoholic content if he is arrested for operating a motor vehicle while under the influence of intoxicants. Section (c) provides that should he refuse to consent to a blood test he is taken before a magistrate, and if he refuses again in writing, or refuses to refuse in writing, then no blood sample is taken. Section (j) of the statute provides that the magistrate shall advise the accused of the penalty for refusal, and if the accused refuses in writing to give blood, or refuses to sign the written refusal, the magistrate makes a certificate to that effect and forthwith issues a warrant charging him with refusal to take a blood test which warrant is executed in the same manner as criminal warrants. Sections (m), (n) and (o) of the statute provide

that if the accused has unreasonably refused to submit to the test he is punished by the suspension of his driver's license for a period of 90 days for a first offense, and six months for a second offense; the procedure for the trial and appeal being as for a misdemeanor.

The statute does not purport to be free of compulsion. Rather it specifically compels the defendant to either give blood, or be tried for refusal to give it.

A recent series of cases in this court and the Supreme Court of Appeals of Virginia have dealt with the problem of involuntary removal of substances from the body and their subsequent use against the defendant in evidence.

Rochin v. State of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), held that pumping the defendant's stomach to recover morphine capsules was so brutal that the method used in taking the evidence offended the Fourteenth Amendment.

Later, *Breithaupt v. Abram,* 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed. (2d) 448 (1957) held that blood taken from a defendant while unconscious, taken under clinical conditions, did not offend the Fourteenth Amendment because there was no brutality involved.

The Virginia cases, all concerning the Implied Consent Law, of *Walton v. Roanoke,* 204 Va. 678, 133 S.E. (2d) 315 (1963), *Caldwell v. Commonwealth,* 205 Va. 277, 136 S.E. (2d) 798 (1964) and *Shumate v. Commonwealth,* 207 Va. 877, 153 S.E. (2d) 243 (1967) have dealt with the same subject.

The *Shumate case* followed *Walton* and *Caldwell,* and following them held that the Fifth Amendment privilege is restricted to oral testimnoy. In addition it cited as authority *Schmerber v. State of California,* 284 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. (2d) 908 (1966), which had been decided while *Shumate* was pending.

Schmerber did not involve an Implied Consent Law and held that blood taken from a defendant over his refusal was admissible in a prosecution for driving under the influence

of intoxicants. The majority opinion held that because the "blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." 86 S.Ct. 1826, 1833.

The dissents in *Schmerber* would have had the privilege cover the blood sample which is of a testimonial nature, among other grounds because '"A close and literal construction (of constitutional provisions for the security of persons and property) deprives them of half their efficacy.'" 86 S.Ct. 1826, 1838.

Although the instant case is similar to *Schmerber,* it is easily distinguishable. *Schmerber* dealt with physical compulsion as an incident of arrest. This case deals with statutory compulsion, which while perhaps not so offensive to the fastidious because no physical violence is used, is far more iniquitous in its long range results because a principle, once established, can only spread to other fields.

The principle which we contend this statute violates, that of imposing a penalty on a person for exercising a Constitutional right, is most recently expressed in *Garrity v. State of New Jersey,* 87 S.Ct. 616 (1967), and *Spevack v. Klein,* 87 S.Ct. 625 (1967).

Of course, if there is no constitutional right to assert, the question becomes moot, and it seems to us the court would have to either distinguish *Schmerber,* or overrule it, if we are to prevail.

Garrity held that a State may not validly condition employment upon the condition that an employee give self-incriminaing statements. The reasoning of the court was expressed as follows:

"The choice imposed on appellants was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers v. State of Florida,* 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, and related cases can be "mental as well as physical"; "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn*

v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed. 2d 242. Subtle pressures *(Leyra v. Denno,* 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; *Haynes v. State of Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed. 2d 513) may be as telling as course and vulgar ones. The question is whether the accused was deprived of his "free choice to admit, to deny, or to refuse to answer." *Lisenba v. People of State of California,* 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166." 87 S.Ct. 616, 618.

Spevack held that an attorney could not be required to either turn over self-incriminatng documents or suffer disbarment. Its rationale was thus expressed by the court:

"In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. State of California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'.

* * * *

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." 87 S.Ct. 625, 628.

This same principle has been many times set forth, for example in *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. (2d) 653 (1964), and *Frost, etc. v. Railroad Commission, etc.,* 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926), and the words of *Frost* seem to foretell the usual course of government.

"If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner,

compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." 46 S.Ct. 605, 607.

For the purpose of argument we must suppose that Henry Carter Litton, the defendant here, has the right to remain silent. If he has this right the Virginia Implied Consent Law has surely manipulated it out of existence, for if Litton remained silent throughout the entire proceeding, as it was his right to do, his driver's license would have been suspended. This certainly makes a mockery of ". . . *the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own free will, and to suffer no penalty . . . for such silence.*" *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 1493-1494, 12 L.Ed. (2d) 653 (1964).

C.

DOES VIRGINIA CODE SECTION 18.1-55.1 VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT REQUIRES THE TAKING OF A BLOOD SAMPLE FROM PERSONS CHARGED WITH DRIVING UNDER THE INFLUENCE OF INTOXICANTS WITHOUT THE ISSUANCE OF A SEARCH WARRANT, ALTHOUGH THERE MAY BE NO EMERGENCY SITUATION?

Litton was arrested at 3:07 p.m., the afternoon of August 31, 1966. He was advised by the arresting State Trooper in accordance with Code of Virginia 18.1-55.1 that he was required to take a blood test. Trooper Edwards, the arresting officer, then obtained the issuance of a warrant for Litton's arrest on the charge of drunk driving from Margaret S. Cantwell, a Justice of the Peace. After the issuance of the warrant, Litton was taken to the hospital where the blood sample was drawn. The sample was taken at 3:40 p.m. on August 31, 1966. Nowhere in the record does it appear that the arresting officer was confronted with an emergency requiring the immediate search of Litton without obtaining a search warrant from a neutral and detached magistrate. It is apparent on the face of the record that the officer in fact obtained a warrant of arrest from the Magis-

trate Cantwell prior to taking the accused to the hospital for the blood test. A Justice of the Peace in Virginia is empowered with authority to issue search warrants, Va. Code of 1950, 19.1-83, 84; 4-54. *Quere:* May such a warrant be issued to draw blood from the person?

The State Trooper's testimony revealed that his observation of Litton established probable cause for the issuance of an arrest warrant for driving while under the influence of intoxicants. Based upon this, the Trooper obtained the arrest warrant from the Justice of the Peace with Litton in attendance. There is no hint that to then go on and seek the issuance of a search warrant by the same Justice of the Peace would have caused an unnecessary delay in obtaining the blood sought to be used in evidence.

The question now is whether Litton's rights against unlawful search and seizure under the Fourth Amendment have been violated? That these rights are protected in State prosecutions was reaffirmed by this court in *Schmerber v. State of California.* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. (2d) 908 (1966).

In the *Schmerber case* this court set out the rules for giving blood tests as follows:

"But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." 86 S.Ct. 1826, 1834.

* * * *

"Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." 86 S.Ct. 1826, 1834.

* * * *

"*Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.*" 86 S. Ct. 1826, 1835.

Schmerber was arrested without a warrant. A considerable amount of time lapsed between the time of the accident and the time of the first opportunity for the officer to obtain a blood test. It appeared to the officer in the *Schmerber case* that there was no time to seek out a magistrate and secure a warrant. The court's ruling under these limited facts was:

"Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." 86 S.Ct. 1826, 1936.

In the instant case the factual situation was considerably different than that confronting the officer in *Schmerber*. There was ample opporunity for the State Trooper in this case to present facts to the Justice of the Peace showing probable cause why a search warrant should issue. This was not done and Litton under compulsion consented to the blood test. We submit that the conditions surrounding the drawing of blood in this case violate Litton's rights under the Fourth Amendment of the United States Constitution to be secure in his person against unreasonable searches and seizures.

The court in *Schmerber* held:

"The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitutiontion does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, *or intrusions under other conditions.*" 86 S.Ct. 1826, 1836.

We contend that the facts of the present case fall within the prohibition of an intrusion under "other conditions," and accordingly the tests of the blood sample taken from Litton are inadmissible because no search warrant was issued in direct violation of the rule in the *Schmerber case*.

CONCLUSION

Since the rights of confrontation, against self-incrimination, and against unreasonable search and seizure have pre-

viously been made obligatory on the States, we have not argued that here.

We submit that this is a clear case of a State denying by statute the rights of an accused as to confrontation, and against self-incrimination, and denying by statute and also by the acts of its officers, the right against unreasonable search and seizure. We further submit that the judgment of the Supreme Court of Appeals of Virginia ought to be reviewed, and upon review the Implied Consent Law of Virginia held to be invalid as conflicting with the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

Respectfully submitted,

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PROOF OF SERVICE

I, H. E. Widener, Jr., one of the attorneys for the petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of September, 1967, I served copies of the foregoing Petition for Certiorari on the respondent by mailing the same in duly addressed envelopes with first class postage prepaid to its respective attorneys as follows: Honorable Robert Y. Button, Attorney General of Virginia, Supreme Court—State Library Building, Richmond, Virginia 23219, and David D. Brown, Esq., Attorney for the Commonwealth for Washington County, Virginia, Abingdon, Virginia 24210.

H. E. Widener, Jr.